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No. 04-1140

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 23, 2005
CERTIORARI GRANTED APRIL 25, 2005

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Notice

The following materials have been omitted in the printing of this Joint Appendix and may be found in the Appendix to the Petition for Writ of Certiorari at the following pages.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 96-1480 LH/RLP

GERALD T. AND JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/25/1996	1	NOTICE OF REMOVAL from 2nd Judicial District Case Number: 1:96:CV:8638 (referred to Magistrate Richard L. Puglisi); (copy of summons & complaint w/jury demand, consent to removal by deft Franklin Capital attached)
11/22/1996	2	ANSWER by deft Franklin Capital Corp [1-1]
03/06/1997	7	INITIAL DISCOVERY ORDER by Magistrate Richard L. Puglisi Discovery cutoff 8/4/97 (cc: all counsel)
05/09/1997	10	MOTION by deft Century-National Ins to dismiss for a failure to state a claim

DATE	NO.	PROCEEDINGS
09/11/1997	20	ORDER by Magistrate Richard L. Puglisi granting pltf's mtn to extend the time until 9/16/97 to file briefs on class certification [19-1] defts until 10/14/97 to respond and pltf until 11/4/97 to reply (cc: all counsel)
10/23/1997	25	MOTION by plaintiffs for order for class certification
11/25/1997	30	CLERK'S MINUTES: before Judge C. LeRoy Hansen of the hearing on the mtn to dismiss for a failure to state a claim [10-1] held on 11/25/97 C/R: Freda Donica
12/10/1997	32	ORDER by Judge C. LeRoy Hansen re the hearing held on deft's mtn to dismiss [30-1] the parties are to submit briefs to the Court on the jurisdictional issue (cc: all counsel)
12/15/1997	—	TRANSCRIPT OF PROCEEDINGS before Judge C. LeRoy Hansen held on 11/25/97; (re [30-1]) lodged in separate file folder
02/03/1998	38	MOTION by plaintiffs to remand case back to State Court for lack of subject matter jurisdiction
02/03/1998	39	MEMORANDUM by defendant Century-National Ins in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]
02/03/1998	40	MEMORANDUM by defendant Franklin Capital in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]

DATE	NO.	PROCEEDINGS
02/03/1998	41	REPLY by plaintiffs to defts memoranda in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]
02/20/1998	44	NOTICE of hearing before Judge C LeRoy Hansen setting hearing on motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] at 9:00 am on 3/4/98 (CLERK: kg) (cc: all counsel by kg)
03/03/1998	45	NOTICE of hearing on pltf's mtn to remand case back to State Court for lack of subject matter jurisdiction [38-1] rescheduled for 4/14/98 at 9:00 am before Judge C. LeRoy Hansen (cc: all counsel electronically) [5k] [0 pages]
04/14/1998	49	CLERK'S MINUTES: before Judge C. LeRoy Hansen on motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] (denied); motion for order for class certification [25-1] (denied) and on motion to dismiss for a failure to state a claim [10-1] (granted) held on 4/14/98; subsequent order to be issued on mtns addressed; C/R: Freda Donica
05/19/1998	—	TRANSCRIPT OF PROCEEDINGS before Judge C. LeRoy Hansen held on 4/14/98 at 9:00 am; (re [49-1]) lodged in separate file
05/21/1998	50	PARTIAL ORDER OF DISMISSAL by Judge C. LeRoy Hansen granting deft's motion to dismiss party for failure to state a claim [10-1] dismissing party Century-National Ins without prejudice (cc: all counsel)

DATE	NO.	PROCEEDINGS
05/21/1998	51	ORDER by Judge C. LeRoy Hansen denying pltf's motion for order for class certification [25-1] (cc: all counsel)
05/21/1998	52	ORDER by Judge C. LeRoy Hansen denying pltf's motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] ("packaging" requirements are hereby suspended to allow pltfs to file interlocutory appeal) (cc: all counsel)
06/05/1998	55	MOTION by pltfs to amend the 5/21/98 Order denying pltfs' motion to remand
06/05/1998	56	MEMORANDUM by pltfs in support of motion to amend the 5/21/98 Order denying pltfs' motion to remand [55-1]
06/29/1998	57	RESPONSE by deft to pltf's motion to amend the 5/21/98 Order denying pltfs' motion to remand [55-1]
11/06/1998	58	MEMORANDUM, OPINION, AND ORDER: by Judge C. LeRoy Hansen denying pltfs' motion to amend the 5/21/98 Order (see Order as further described herein) [55-1] (cc: all counsel, electronically) [21k] [7 pages]
12/11/1998	60	RESPONSE by pltfs Gerald T Martin & Juana M Martin to Memorandum, Opinion Order filed on 11/6/98
03/30/1999	61	ORDER by Judge C. LeRoy Hansen granting pltfs' request for a voluntary dismissal with prejudice in order to file an appeal and obtain a ruling from the Tenth Circuit regarding whether or not diversity jurisdiction exists over the pltf's claims [60-1] (cc: all counsel)

DATE	NO.	PROCEEDINGS
03/30/1999	62	FINAL JUDGMENT: by Judge C. LeRoy Hansen dismissing this matter on the merits and resolves all remaining issues and adjudicates all rights and liabilities of the parties dismissing case with prejudice (cc: all counsel)
04/27/1999	63	NOTICE OF APPEAL by plaintiff Gerald T Martin, plaintiff Juana M Martin from Dist. Court decision [62-2]; Fees $105.00—Distribution as required. (cc: all counsel)
06/25/2001	65	COPY of judgment from USCA: defendants have failed to establish the requisite amount in controversy, and the USDC therefore lacked subject matter jurisdiciton; accordingly, the USDC Judgment is reversed and remanded with directions to remand to State Court [Appeal [63-1] [538k] [23 pages]
06/29/2001	66	ORDER by District Judge C. LeRoy Hansen upon remand from the Tenth Circuit Court of Appeals remanding this case to the Second Judicial District Court for the State of New Mexico 65-1] remanding case to state court (cc: all counsel*) [8k] [1 page]
07/09/2001	67	COPY of USCA Order: Taxing Costs in favor of Appellants/pltfs in the sum of $730.80
07/17/2001	68	MOTION by pltfs for an award of attorney fees and expenses (amounts not specified) [78k] [4 pages]

DATE	NO.	PROCEEDINGS
07/17/2001	69	MEMORANDUM by pltfs in support of motion for an award of attorney fees and expenses (amounts not specified) [68-1] [450k] [16 pages]
07/25/2001	73	RESPONSE by deft to pltfs' motion for an award of attorney fees and expenses [68-1] [402k] [12 pages]
01/24/2002	76	MEMORANDUM, OPINION, AND ORDER: by District Judge C. LeRoy Hansen denying pltf's motion for an award of attorney fees and expenses [68-1] (cc: all counsel*) [27k] [8 pages]
02/15/2002	77	NOTICE OF APPEAL by plaintiff Gerald T Martin, plaintiff Juana M Martin from Dist. Court decision [76-1]; Fees $105.00—Distribution as required. (cc: all counsel) [33k] [2 pages]
03/25/2002	79	CLERK'S ORDER settling costs, costs are taxed against defts in the amount of $612.58 (cc: all counsel*) [6k] [1 page]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-2048

GERALD T. AND JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/22/02	(1488280) Civil case docketed. Preliminary record filed. DATE RECEIVED: 2/21/02. Transcript order form due 3/4/02 for Freda Donica pursuant to R.42.1. Docketing statement due 3/4/02 for Gerald T. Martin and Juana M. Martin. Notice of appearance due 3/4/02 for Franklin Capital, Gerald T. Martin and Juana M. Martin. (jal)
6/7/02	(1517234) Appellant's brief filed by Juana M. Martin and Gerald T. Martin. Original and 7 copies. c/s: y. Served on 6/6/02. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 401. Appellee's brief due 7/9/02 for Century-National and Franklin Capital. (jal)

DATE	PROCEEDINGS
8/19/02	(1537316) Appellee's brief filed by Franklin Capital and Century-National. Original and 7 copies. c/s: y. Served on 8/13/02. Oral Argument? n. Appellants' optional reply brief due 8/30/02 for Gerald T. Martin and Juana M. Martin. (klp)
9/23/02	(1547441) Appellants' reply brief filed by Juana M. Martin and Gerald T. Martin. Original and 7 copies. c/s: y. (gah)
1/15/04	(1678460) Case argued by James M. Pietz for the appellant; Jan T. Chilton and Steven Douglas Looney for the appellee, and submitted to Judges Seymour, Briscoe, Payne. (hrs)
12/30/04	(1768803) Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Seymour, authoring judge; Briscoe; Payne. [02-2048] Parties served by mail on 12/30/04. (na)
1/21/05	(1774431) Mandate issued. (na)
3/4/05	(1788121) Petition for writ of certiorari filed on February 23, 2005 and placed on the docket February 8, 2005. Supreme Court Number 04-1140. (jmm)

STATE OF NEW MEXICO
IN THE DISTRICT COURT
FOR THE SECOND JUDICIAL DISTRICT

No. CV-96-0008638

GERALD T. MARTIN and JUANA M. MARTIN, individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation licensed to do business in New Mexico, and CENTURY NATIONAL INSURANCE, a California Corporation,
Defendants.

A JURY TRIAL IS DEMANDED

CLASS ACTION COMPLAINT

INTRODUCTION

1. This action is brought on behalf of a class of New Mexico Plaintiffs ("Borrowers") who financed the purchase of automobiles pursuant to Motor Vehicle Retail Installment Contracts ("Sales Contracts") that were thereafter assigned to Franklin Capital Corporation. In the Sales Contracts, the Borrowers agreed that property insurance or similar insurance protecting the assignee or seller could be purchased and the insurance premium could be added to the principal balance then owing under the Sales Contracts.

Instead, Franklin (the assignee) purchased and charged Borrowers for different, higher costing insurance and other illegal charges. Franklin is, therefore, subject to liability for

violations of New Mexico statutory law, breach of contract and breach of fiduciary duty and other violations as set forth below.

Century, by agreement with Franklin, or otherwise participating with Franklin with knowledge (or in reckless disregard) of the terms of Plaintiffs' contracts, tortiously interfered with their contracts.

PARTIES

2. The Representative Plaintiffs Gerald T. Martin and Juana M. Martin ("Martins") are individuals, that at all relevant times, resided in New Mexico at P. 0. Box 515, Crownpoint, New Mexico 87313.

3. Defendant Franklin Capital Corporation ("Franklin") is a Utah Corporation with principal offices at 47 West 200 South, Ste 500, Salt Lake City, Utah 84101. Franklin is a subsidiary of Franklin Resources, Inc., a Delaware Corporation located in San Mateo, CA, which is a holding company involved throughout the United States in investment management. Franklin is a privately owned corporation engaged, in part, in the purchase of Sales Contracts from car dealers in New Mexico and other states. In the course of this business, Franklin purchases insurance to insure its interests in the Sales Contract.

4. Century National Insurance ("Century") is a California Corporation with principal offices located at 12200 Sylvan Street, North Hollywood, CA 91606. Century is an automobile, fire and casualty insurance company. Century provides Vendor Single Interest insurance coverage to Franklin.

5. Dealers in this Complaint refer to automobile dealers in New Mexico who have contracted with Franklin for financial services. It does not include within its scope any of the Defendants.

FRANKLIN'S LIMITED RIGHT TO CHARGE BORROWERS FOR INSURANCE COVERAGE SIMILAR TO THE PROPERTY INSURANCE REQUIRED BY THE SALES CONTRACTS

6. Franklin enters into agreements with motor vehicle dealers in New Mexico to purchase Sales Contracts. Under such agreements the dealers agree to sell and assign to Franklin their Sales Contracts which are entered into between Dealers and Borrowers as part of the purchase and financing of motor vehicles sold by the Dealers. As part of these agreements between the Dealers and Franklin, standard form Sales Contracts are utilized with contract terms approved and/or required by Franklin.

7. The Sales Contracts require the Borrowers to maintain property insurance covering the vehicle's "full value," making the borrower the insured and the seller (or its. assignee) the loss payee. *See* Exhibit A, page 1, the Martins' Motor Vehicle Installment Contract, which was assigned to Franklin:

> *Property Insurance:* You promise to keep the motor vehicle described above insured for its full value against loss or damage and with a loss payable endorsement in our favor. YOU MAY OBTAIN YOUR REQUIRED INSURANCE FROM ANY COMPANY ACCEPTABLE TO US; HOWEVER, THE DEDUCTIBLE UNDER YOUR POLICY CANNOT EXCEED $500.

8. The Additional Terms, Agreements and Conditions, Section 5 on the back of the form Installment Contracts under the heading "Insurance" further require borrowers to obtain property insurance covering "not less than the balance due under the Contract," and to maintain such insurance until the Sales Contract is fully paid. The "Insurance" provision provided:

> Debtor agrees to keep the Property insured at its own expense against fire, theft, transportation, collision and

such other risks as Seller or assignee shall designate; such insurance shall be for an amount not less than the balance due under this Contract and shall be in force so long as any part thereof remains unpaid; such insurance is to be placed in insurance companies acceptable to Seller or assignee and loss thereon is to be paid to Seller or assignee and Debtor as their interests may appear.

9. The "Insurance" provision also contained a request from the borrower to the seller or assignee that at its option it could pay the premiums for "such insurance or similar insurance protecting the Seller or assignee only," *i.e.*, insurance similar to property insurance which the Borrower was required to maintain under the Sales Contract. In those instances where the seller or assignee exercised its option to pay the insurance, Franklin had an additional option to add the premium to the unpaid balance under the Sales Contract or alternatively require additional installment payments. The "Insurance" provision provided:

> Debtor hereby requests and authorizes Seller or assignee at Seller's or assignee's option and without obligation to do so, to pay the premiums either *for such insurance or similar insurance* protecting Seller or assignee only, adding same to principal balance then owing or by an advance which constitutes additional indebtedness and is secured hereunder and payable in additional installments due on this Contract. The policies therefor shall be held by Seller or assignee until this Contract is fully performed. (Emphasis added)

FRANKLIN'S SCHEME TO CHARGE BORROWERS FOR HIGHER COSTING, DIFFERENT INSURANCE THAN AGREED TO IN THE SALES CONTRACTS

10. Franklin, in exercising its option, did not charge Borrowers for "such or similar insurance protecting Seller or assignee only." Instead, Franklin purchased from Century and

charged Borrowers for higher costing and different insurance. The insurance purchased by Franklin and charged Borrowers was different in at least the following respects:

a) Franklin charged Borrowers for the cost of insurance premiums for the complete term of the Sales Contract based upon the unpaid balance at the time the insurance was purchased. Thus, Franklin charged the Martins up front 4-1/2 years of insurance premiums to be paid over the entire term of the Sales Contract, rather than semi-annual or annual premiums based upon the declining value of the vehicle. Multiple year property insurance coverage is unavailable to car buyers. Therefore the 4 year plus insurance coverage purchased by Franklin was not contractually authorized, because it was not "similar" to the property insurance available to the Martins.

b) Franklin charged the Martins for Century's insurance, which required that any refund, would be calculated by the Rule of 78s. Section 58-19-7 (D) NMSA, however, requires that Borrowers be credited with any refunds of unearned premiums and does not authorize the Rule of 78s.

c) The Borrower's Sales Contract provided that any prepayment of any unpaid principal balances would be calculated by the use of the accrual method and would not be subject to a penalty. Calculation of refunds by the Rule of 78s results in a penalty. And

d) Franklin purchased, placed, and charged purchasers for Vendor Single Interest ("VSI") insurance which covered insurance in excess of "fire, theft, transportation, collision and such other risks as Seller or Assignee shall designate" in violation of the Borrower's Sales Contracts.

11. Franklin at all material times knew, or should have known, that it was charging Borrowers for insurance distinctly different and more costly than the vehicle insurance agreed to in the Sales Contract. In this connection, Franklin entered into a master collateral protection insurance contract with Century so it could directly or indirectly financially benefit from charging Borrowers for more expensive insurance. The Master Policy provided that Franklin would purchase VSI from Century to cover its alleged interest in the Sales Contracts that it purchased from New Mexico car dealers. Franklin knew and Century knew or should have known that Borrowers would be charged for insurance that was different from and more expensive than the insurance required by the Sales Contracts.

FRANKLIN'S INSURANCE CHARGING SCHEME RESULTED IN SUBSTANTIAL OVERCHARGES BEING COLLECTED FROM PLAINTIFF-BORROWERS

12. On December 14, 1994 Gerald and Juana Martin agreed to purchase a 1994 Chevrolet from Casa-Chevrolet-Geo, Inc. ("Dealer") an automobile dealership at 7201 Albuquerque, New Mexico 87110. To finance the sale; the Martins executed a Sales Contract with the Dealer. *See* Ex. A attached. The Sales Contract explicitly provided that it would be governed by the laws of New Mexico.

13. The Martins' Sales Contract provided that the Martins would pay the Seller or assignee a total sale price of $33,157.00 including a finance charge of $6,374 (less a $3,937 downpayment). The term of the Sales Contract was for 5 years.

14. The Dealer, pursuant to a prior agreement, sold and assigned the Martins' Sales Contract to Franklin.

15. The Martin's Sales Contract contained form insurance provisions and provided that the Martins could obtain their own property insurance. On January 1, 1995 Franklin sent an

"Insurance Reminder Notice" to the Martins informing them that they were contractually required to maintain "comprehensive, fire, theft and collision coverage" on their financed motor vehicle for the five (5) year period December 12, 1994 to December 25, 1999. *See* Ex. B attached hereto which describes the vehicle insurance as follows:

> DEAR CUSTOMER: As you know, your installment contract requires that you maintain fire, theft, and collision damage insurance on your financed collateral for the term of the contract. Our records indicate that we have not received a current, valid policy covering our interests. . . .
>
> POLICY REQUIREMENTS: The insurance policy you furnish should provide Comprehensive, Fire, Theft and Collision coverage, be effective 12-14-94 to 12-25-99, and contain a Lienholder's Loss Payable endorsement in favor of the lienholder.

16. The "Reminder" further notified the Martins that failure to procure the specified coverages would result in Franklin placing a "Lienholder Minimum Protection Insurance" Policy ("LMPI Policy") which "protects our loan balance against loss caused by fire, theft, collision or upset". The "Reminder Notice" (Ex. B) provided:

> Insurance coverage is an essential requirement of the loan contract, and it is therefore necessary that your policy or binder be delivered to us within 10 days of the above date to avoid the necessity of our placing a Lienholder's Minimum Protection Policy (Insurance which protects our loan balance against loss caused by Fire, Theft, Collision or Upset.)

17. The "Reminder Notice" was unfair, deceptive, and/or fraudulent in at least the following respects:

A. The "Reminder Notice" falsely stated that the Martins were contractually required to obtain prepaid insurance for a term of 5 years;

B. The "Reminder Notice" failed to describe (or otherwise designate) the premiums and the actual coverages and the actual terms, exceptions, limitations and restrictions of the "LMPI" insurance that Franklin intended to purchase and charge to Borrower; and

C. The Notice falsely implied that only the cost of the insurance was going to be charged the Martins, and it withheld information that the charge would be greater than the actual "costs." It is believed that Franklin directly or indirectly received part of the premiums which, as required by the Sales Contract, should have been credited to the Borrowers' accounts.

18. On January 29, 1995 Franklin sent a "Notice of LMPI" to the Martins. *See* Ex. C. The "Notice of LMPI" again falsely advised Martins that the Sales Contract authorized Franklin to purchase and charge them for the insurance in fact charged and that Franklin had purchased and charged the Martins for a full five (5) years of coverage. The LMPI thus provided:

> DEAR CUSTOMER: . . . . This is to advise that we have ordered a Lienholder's Minimum Protection Insurance Plan Certificate effective 1214-94 thru 12-25-99 in accordance with the provision of the Retail Installment Contract.

19. The "Notice of LMPI" described the charges, coverage, limits of liability and deductible as follows:

COVERAGE	LIMITS OF LIABILITY	DEDUCTIBLE
	The *Lesser of*:	The *Larger* of:
A Collision or Upset	1. Actual Cash Value Less Deductible; or	1. $100; or
B Comprehensive-Loss or damage to the automobile, except by Collision or Upset	2. Net Unpaid Installment Contract Balance Less Delinquent Payments.	2. 20% of Amount of Loss (Maximum Deductible $250).

The cost of this Lienholder's Minimum Protection Plan Certificate for the term shown is $8,848.00

This amount, plus additional finance charges, will be charged to you thereby increasing your remaining contract balance.

20. The "Notice of LMPI" also described the "LMPI" as providing limited physical damage loss:

> The insurance bound is only with respect to the above collateral, for such and so many of the coverage specified and is subject to all the terms of the Certificate having reference thereto.
>
> PLEASE NOTE that this Lienholder's Minimum Protection Plan Certificate provides you with only limited protection against physical damage loss to the above vehicle and DOES NOT PROVIDE BODILY INJURY AND PROPERTY DAMAGE LIABILITY INSURANCE AND DOES NOT COMPLY WITH ANY FINANCIAL RESPONSIBILITY LAW.

21. The "Notice of LMPI" was unfair, deceptive, and/or fraudulent in at least the following respects:

A. The "Notice of LMPI" falsely stated that the Martins under their Sales Contract were responsible for the insurance purchased by Franklin for a term of five (5) years;

B. The "Notice of LMPI" failed to disclose the actual insurance costs paid by Franklin, the true coverages and the actual terms, exceptions, limitations and restrictions of the "LMPI" insurance that Franklin had purchased or had ordered and would charge to the Martins;

C. The "Notice of LMPI" falsely notified the Martins that they would have to pay $10 if they elected to cancel this insurance within the next thirty (30) days or an amount calculated by the Rule of 78's if cancelled thereafter; and

D. The "Notice of LMPI" falsely notified the Martins that they would have to pay for Franklin's insurance although it had a lower deductible of $250 instead of the required $500, which would have been much less expensive.

22. On June 11, 1995 Franklin sent a corrected Insurance Reminder Notice, (Ex. D) and on July 9, 1995 Franklin sent a corrected "Notice of LMPI." *See* Exhibit E. This Notice advised the Martins that a LMPI Policy had been ordered for the 4-1/2 year teen 6-10-95 through 12-25-99. (Ex. E) and stated that the 4-1/2 year term for the premium for Franklin's insurance as authorized as a charge under the Sales Contract was $7,636.00.

COVERAGE	LIMITS OF LIABILITY	DEDUCTIBLE
	The *Lesser* of:	
A Collision or Upset	1. Actual Cash Value Less Deductible; or	$500.00
B Comprehensive-Loss or damage to the automobile, except by Collision or Upset	2. Net Unpaid Installment Contract Balance Less Delinquent Payments.	

The cost of this Lienholder's Minimum Protection Plan Certificate for the term shown is $7,636.00

This amount, plus additional finance charges, will be charged to you thereby increasing your remaining contract balance.

23. The June 11, 1995 "Insurance Reminder" and the July 9, 1995 Notice of LMPI were unfair, deceptive and/or fraudulent in the same respect as the earlier Reminder and Notice of LMPI (except for the now corrected deductible amount) in that they falsely represented the type of insurance required and actually ordered and to be charged.

24. On August 6, 1995 Franklin and/or Century sent a Certificate of Insurance Add-on ("Add-On Notice") to the Martins advising that Franklin had placed the "LMPI" Policy and added $7,636.00 to their Sales Contract balance subject to the applicable 10% interest rate. Exhibit F.

25. The "Add On Notice", by its reference to California law, indicates that this insurance was not intended to comply with New Mexico law.

26. The Insurance Certificate was unfair, deceptive and/or fraudulent in that the Certificate falsely states that the Mar-

tins' Sales Contract required them to pay for Franklin's 4-1/2 year prepaid insurance coverage.

27. The August 8, 1995 certificate also advised the Martins that they could elect to pay the $7,636.00 in one payment or pay 52 equal installment payments of $180.66 financed at the contract rate of 10% in addition to their regular payments. *See* Ex. F. The Election form indicated that failure to make an election would result in the application of the installment option. The Martins failed to elect an option.

28. Franklin thereafter billed, charged and collected from the Martins and other Borrowers illegal and excessive late fees or delinquency charges. In this connection, New Mexico law Sec. 58-19-7 (E), only authorizes late fees of $15.00 or 5% of each installment whichever is less.

29. Franklin, however, billed, charged and collected from the Martins illegal late fees in excess of the lesser of $15.00 or 5% of the monthly installment. On July 6, 1995, August 5, 1995, and September 5, 1995, Franklin mailed late charge notices to the Martins. Ex. G. Each of these "Late Charge Notices" falsely and illegally billed the Martins for late fees in excess of the maximum allowable late fee.

30. As a result of Franklin's excessive charges to the Martins for 4-1/2 years of premiums of $7,636.00 which was added to the Martins' Sales Contract unpaid balance, the Martins could not pay these increased premiums and other illegal charges and shortly thereafter Franklin repossessed the Martins' automobile.

31. In repossessing the Martins' automobile and canceling their sales contract. Franklin illegally charged the Martins a $35.00 administrative fee. The Sales Contract and state law requires that the amount of the unpaid principal balance owed be calculated-by the Rule of 78s. *See* Exhibit 1, Section 8. The Sales Contract and 58-19-9 NMSA prohibit any other charge or penalty from being assessed.

32. Included in the Martins' Sales Contract was an extended service contract in the amount of $910.00. *See* Ex. H "General Motors Protection Plan Coverage Agreement" ("GMPP"). The GMPP provided that in instances of cancellation after 60 days the unused portion, less a $35.00 administrative fee, would be refunded. In canceling the Martins' GMPP, General Motors and Franklin agreed to recover the $35.00 from the Martins although such a charge was not authorized. In doing so, Franklin breached its contract with the Martins and violated 58-19-9 NMSA. Franklin has similarly charged numerous other class members for these illegal, unauthorized charges.

33. Finally, Franklin caused the Martin car to be repossessed and sold. In this connection, Martin's car was sold at auction for $13,800 by Salt Lake Auto Auction which subtracted $420.00 from the sale for its services leaving a balance of $13,380 which it tendered to Franklin. *See* the "Consignor's Statement", Exhibit."I".

34. Thereafter, Franklin charged the Martin's a second so-called repossession cost of $447.84 which was not authorized by the Parties' contract and/or N.M.Stat. §55-9-504 and which therefore was illegal.

35. Franklin's Insurance charging scheme resulted in substantial illegal overcharges being charged and collected from the Representative and Class Plaintiffs which scheme caused substantial damage to the Martins and thousands of other New Mexico borrowers.

CLASS ALLEGATIONS

36. This action is brought as a class action pursuant to SCRA 1-023 on behalf of all Borrowers who purchased automobiles from New Mexico car dealers pursuant to Motor Vehicle Retail Installment Contracts assigned to Franklin who have been charged for Franklin's Lienholders Minimum Protection Insurance.

37. The Class of Borrowers is believed to include more than a thousand New Mexico residents and is, therefore, so numerous as to make it impracticable to bring all members of the respective class before the Court. The exact number of Borrowers is unknown to the representative Plaintiffs, the Martins, but may be determined from the records maintained by Franklin. In many instances, such persons are unaware that claims exist on their behalf or, having knowledge of such claims, have, in most instances, sustained damages in such amounts that when taken individually are too small in number to justify the expense and effort required to bring suit separately, but whose damages are of such a significant size, if taken as a group, that they do justify the taking of legal action.

38. Common questions of law and fact affect the rights of each member of the Class. Among the predominating common questions of fact or law are:

A. What insurance coverage was Franklin contractually authorized to purchase and charge to Borrowers?

B. What insurance coverage did Franklin actually purchase and charge to Borrowers?

C. Was the insurance coverage Franklin actually purchased and charged to Borrowers "similar" coverage to the insurance coverage that Borrowers authorized Franklin to purchase and charge to them?

D. Did Franklin commit unfair, deceptive and/or unconscionable practices in violation of the Unfair Trade Practice by inflating the insurance cost charged to Borrowers?

E. Did Franklin violate the Unfair Insurance Practices Act by failing to disclose the actual insurance coverage charged to Borrowers?

F. Did Franklin breach its Sales Contracts with Borrowers by charging Borrowers for insurance coverage different and more expensive than that authorized by the Sales Contracts?

G. Did Franklin breach a fiduciary duty by procuring insurance different than that authorized by the Sales Contracts?

H. Did Franklin violate the Motor Vehicle Sales Finance Act by failing to disclose the actual insurance costs and insurance coverage that Franklin was authorized to charge Borrowers?

I. Was it legal for Franklin to contract with General Motors to charge Borrowers who cancelled their sales contracts a $35.00 "administrative fee" in connection with the "GMPP"?

J. Did Franklin's conduct constitute an intentional or negligent breach of a duty to disclose?

K. Did Franklin violate the sales contract and/or New Mexico's law by charging late fees that exceeded 5% of the undisclosed balance?

L. Did Franklin, in violation of its sales contracts and/or state law impermissibly charge the second repossession cost? and

M. Did Century tortiously interfere with the contractual rights of the Borrowers by separately agreeing with Franklin to sell, purchase, place and charge Borrowers for different and more expensive insurance than that authorized by the Sales Contracts and/or as designated by Franklin?

39. The Representative Plaintiffs, the Martins, will assure the adequate representation of all members of the class, and have no conflict with class members in the maintenance of this action. The Martins' claims are not only typical but

identical to the claims of the members of the Class. They have no relationship with Franklin or Century except as set forth in this Complaint, and are aware that they cannot settle this action without Court approval. Their interests in this action are antagonistic to the interests of Franklin or Century and they will vigorously pursue the claims of the Class.

40. The Representative Plaintiffs can acquire the financial resources to litigate this action. Moreover, undersigned counsel have agreed to advance all reasonable and necessary costs to litigate this action contingent on the outcome.

41. Retained counsel are experienced in litigating class actions and have handled many consumer and other types of class actions in the state and federal courts for and on behalf of other consumers. Counsel are handling this case on a contingent basis and will receive compensation for their professional services only as awarded by this Court.

42. A class action provides a fair and efficient method of adjudicating this controversy. The substantive claims of the Borrowers are identical and will require evidentiary proof of the same kind and application of the same law. Since Franklin and Century have treated and are treating all members of the Class in a similar and/or identical manner equitable and declaratory relief is appropriate with respect to the Class.

43. There are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the class fund will be minimized. The Martins believe, and therefore aver, that because members of the Class are unaware that their rights have been violated, or, if aware, would be unable to secure counsel to litigate their claims on an individual basis that a class action is the only proceeding in which they can recover. Individual actions, as a result of the doctrine of *stare decisis*, could substantially impair the

rights of the purported members of the class and an inconsistent adjudication would require Franklin to treat similarly and/or identically treated Class members differently.

44. The Martins are unaware of any other similar litigation against Franklin or Century and believe that this action will further the public policies underlying New Mexico law.

COUNT I

FRANKLIN'S VIOLATION OF THE UNFAIR PRACTICES ACT

45. The averments of the foregoing Paragraphs 1 through 44 are incorporated.

46. Franklin falsely represented that it could charge Borrowers for insurance for the entire term of their loan instead of only for no more than 6 months at a time.

47. Franklin concealed:

A. That the actual insurance-coverage that it was purchasing and charging to Borrowers was not authorized by their Sales Contract;

B. That Borrowers had to pay $10 if they purchased their own insurance within thirty (30) days after it was purchased by Franklin or thereafter a penalty, as calculated by the Rule of 78's, if they provided their own insurance;

C. That the insurance coverage that was purchased and charged to Borrowers by Franklin was more expensive than "Fire, Theft, Collision or Upset" insurance; and

D. That other charges (such as excessive late fees, repossession costs that were not contractually or legally justified or other fees) not authorized by the Sales Contract or by law would be billed, and as-

sessed by charging and collecting such excessive fees.

48. The conduct and/or false representations of Franklin constitute "unfair or deceptive trade practices as defined in Section 57-12-2 (D) NMSA including, but not limited to, the following specifically defined practices as listed in Sections 57-12-2(D) (5), (14) and (17):

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> (14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;
>
> (17) failure to deliver the quality or quantity of goods or services contracted for;

49. The conduct and/or representations of Franklin further constitutes an "unconscionable trade practices" within the meaning of 57-12-2(E) which provides:

> E. "unconscionable trade practice" means any act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services or in the extension of credit or in the collection of debts which to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
>
> (2) results in a gross disparity between the value received by a person and the price paid.

50. The Representative and Class Plaintiffs have been damaged by Franklin's violations of the Unfair Practices Act.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request judgment declaring that Franklin has violated the New Mexico Unfair Practices Act and awarding damages, treble damages and such other relief as authorized by 57-12-10 NMSA.

COUNT II

FRANKLIN'S VIOLATION OF THE UNFAIR INSURANCE PRACTICES ACT

51. The averments of the foregoing Paragraphs I through 50 are incorporated.

52. Franklin concealed material facts by charging Borrowers for insurance different from and more costly than that authorized by the Sales Contracts. Franklin's actions are unfair, deceptive or fraudulent practices within the meaning of Section 59A-16-3 NMSA. In this connection, any determination that Franklin has committed unfair or deceptive practices under the Unfair Insurance Practices Act in connection with its procurement of insurance also constitutes violation of the Unfair Insurance Practices Act.

53. Franklin's concealment of material facts constitute violations of Section 59A-16-4 (A), (E) and (G) which provide:

> 59A-16-4. Misrepresentation, false advertising of policies.
>
> No person shall make, publish, issue or circulate any estimate, illustration, circular, statement, sales presentation or comparison which:
>
> A. misrepresents the benefits, advantages, conditions or terms of any policy;
>
> * * * *

G. fails to disclose material facts reasonably necessary to prevent other statements made from being misleading.

54. The Representative and Class Plaintiffs have been damaged as a result of Franklin's violations of the Unfair Insurance Practices Act.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request judgment declaring that Franklin has violated the New Mexico Unfair Insurance Practices Act and awarding damages and such other relief as authorized by Section 59A-16-30 NMSA.

COUNT III

FRANKLIN'S VIOLATIONS OF THE MOTOR VEHICLE SALES FINANCE ACT

55. The foregoing Paragraphs 1 through 54 are incorporated.

56. The conduct of Franklin constitutes violations of Section 58-19-7(C) NMSA (the "Motor Vehicle Sales Finance Act") which provides:

> C. The amount, if any, included for insurance, which *may* be purchased by the holder of the retail installment contract, shall not exceed the applicable premiums chargeable in accordance with the rates filed with the department of insurance of the state corporation commission. If dual interest insurance on the motor vehicle is purchased by the holder, it shall within thirty days after execution of the retail installment contract send or cause to be sent to the buyer a policy or policies or certificate of insurance written by an insurance company authorized to do business in this state, clearly setting forth the amount of the premium, the kind or kinds of

> insurance, the coverages and all the terms, exceptions, limitations, restrictions and conditions of the contract or contracts of insurance. The buyer shall have the privilege of purchasing such insurance from an agent or broker of his own selection and of selecting an insurance company acceptable to the holder, and in such case, the inclusion of the insurance premium in the retail installment contract shall be optional with the seller.

57. Franklin violated Section 58-19-7(C) by charging Borrowers a rate for insurance in excess of that rate allowed by the New Mexico Department of Insurance.

58. Franklin violated Section 58-19-7(D) by purchasing and placing insurance requiring the use of the Rule of 78s in calculating insurance refunds since neither the contract or 58-19-7(D) NMSA authorizes the use of the Rule of 78s.

59. Franklin violated Section 58-19-7(E) by charging Plaintiffs excessive late or delinquency fees.

60. Franklin violated Section 58-19-9 by charging Plaintiffs a $35.00 fee in connection with the cancellation of the GMPP which was financed by the Sales Contract.

61. The Representative and Class Plaintiffs have been damaged as a result of Franklin's violations of the Motor Vehicle Sales Finance Act and are entitled to damages pursuant to Section 58-19-11(B) including the recovery of all finance, collection, delinquency and other charges paid.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs' request judgment against Franklin declaring them to be in violation of the Motor Vehicle Sales Finance Act and awarding damage pursuant to Section 58-19-11(B) NMSA and voiding the Sales Contracts and returning all amounts paid to Franklin by Plaintiffs.

COUNT IV

FRANKLIN'S BREACH OF CONTRACT

62. The averments of the foregoing Paragraphs 1 through 61 are incorporated.

63. Franklin, as the assignee, undertook the contractual duty to procure (where the option was exercised) "similar" insurance to the motor vehicle insurance which the Borrowers were required to obtain under their Sales Contracts and to charge, bill and collect only those charges authorized by the Sales Contract.

64. Franklin failed to perform its contractual obligations as follows:

A. The insurance coverage that it was purchasing and charging to Borrowers was not authorized by their Sales Contract;

B. Borrowers were charged for insurance for the entire term of their loan instead of for no more than 1 year;

C. Borrowers had to pay $10 if they purchased their own insurance within thirty (30) days after it was purchased by Franklin or thereafter if an insurance expense was charged, a penalty, as calculated by the Rule of 78's if they provided their own insurance;

D. Charging unauthorized repossession costs;

E. The insurance coverage that was purchased and charged to Borrowers by Franklin was more expensive than the "Fire, Theft, Collision or Upset" as authorized by the sales contract and/or as designated by Franklin; and

F. Borrowers were charged $35.00 for cancellation of the GMPP which was not authorized by the Sales Contract.

65. The Representative and Class Plaintiffs have been damaged by Franklin's breach of its contractual duties.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached its contracts and awarding them damages and all other relief deemed appropriate by the Court.

COUNT V

FRANKLIN'S BREACH OF FIDUCIARY DUTY

66. The foregoing Paragraphs 1 through 65 are incorporated.

67. Franklin assumed a fiduciary duty to procure and charge for only that insurance authorized in the Sales Contracts if and when Franklin exercised its option to place insurance.

68. Franklin breached its fiduciary duty by procuring, charging and collecting for different and more expensive insurance which was not authorized by the Plaintiffs in their Sales Contracts and/or as designated by Franklin and by obtaining a secret fee or profit or commission.

69. The Representative and Class Plaintiffs have been damaged by Franklin's breach of fiduciary duty.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached its fiduciary duty and awarding Plaintiffs compensatory damages, punitive damages and any other relief deemed just and proper by this Court.

COUNT VI

FRANKLIN'S FRAUDULENT CONCEALMENT AND BREACH OF A DUTY TO DISCLOSE

70. The foregoing Paragraphs 1 through 69 are incorporated.

71. Franklin assumed a duty to disclose to the Representative and Class Plaintiffs the actual cost and type of vehicle insurance to be procured on their behalf. Franklin's duty to disclose arose as a result of its fiduciary duty owed towards Plaintiffs in procuring insurance and in connection with its duties in providing Plaintiffs with insurance coverage.

72. Franklin breached its duty to disclose by concealing and failing to disclose to Borrowers that it was providing different and higher costing insurance than that authorized by the Sales Contract. Franklin also breached its duty to disclose by concealing and failing to disclose that it was billing and charging Plaintiffs for other charges not authorized by the Sales Contracts. Borrowers had a right to reasonably rely on Franklin to bill, charge and collect only those amounts authorized by the their Sales Contracts.

73. Franklin's conduct in concealing and failing to disclose was intentional and/or negligent and has damaged the Plaintiffs.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached a duty to disclose by concealment and nondisclosure and awarding them compensatory damages, punitive damages and all other relief deemed appropriate by the Court.

COUNT VII

CENTURY'S TORTIOUS INTERFERENCE WITH PLAINTIFFS' CONTRACTUAL RELATIONS

74. The foregoing Paragraphs 1 through 73 are incorporated.

75. Century knew or recklessly disregarded available information that under the Sales Contract, Franklin's right to purchase insurance at Plaintiffs' expense was limited to "similar" insurance and, therefore, was limited as to both types of coverages and required term of the loan.

76. It is believed and therefore averred that Century directly or indirectly paid Franklin or its affiliates or subsidiaries a commission or ratio which amounts should have been credited to reduce the Plaintiffs' unpaid balance.

77. Century tortiously interfered with the contractual relationship between the Plaintiffs and Franklin by financially inducing and assisting Franklin in its scheme to overcharge Plaintiffs.

78. As a direct and proximate result of Century's tortious actions, the Representative and Class Plaintiffs have suffered economic loss or injury.

RELIEF

WHEREFORE, the Plaintiffs request that judgment be entered declaring that Century tortiously interfered with Plaintiffs' contractual rights and awarding them compensatory damages, punitive damages and all other relief deemed just and proper by the Court.

[signatures and exhibits omitted in this printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN, Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,
Defendants.

NOTICE OF REMOVAL

Defendant Century-National Insurance Company, with the consent and concurrence of Defendant Franklin Capital Corporation, respectfully shows the court as follows:

1. A civil action has been commenced and is now pending in the Second Judicial District Court, Bernalillo County, New Mexico, Cause No. CV 96-0008638, in which Gerald T. Martin and Juana M. Martin have filed suit against Franklin Capital Corporation and Century-National Insurance Company.

2. Plaintiffs' initial pleading entitled "Class Action Complaint" alleged that Franklin Capital Corporation violated the New Mexico Unfair Practices Act, the New Mexico Unfair Insurance Practices Act, the Motor Vehicle Sales Finance Act and breached its contract, its fiduciary duty and its duty to disclose. The Class Action Complaint alleged that Century-National Insurance Company interfered with plaintiffs' contractual relations.

3. The two named plaintiffs are citizens of the State of New Mexico. See, complaint, ¶ 2. The putative class members are New Mexico citizens. *See*, complaint, ¶ 37. Each of the defendants is a foreign corporation incorporated in a state other than New Mexico and having its principal place of business in a state other than New Mexico. *See*, complaint, ¶¶ 2, 3 and 4. There is complete diversity of citizenship between the parties.

4. The amount in controversy, exclusive of interest and costs, cannot be determined from the face of the complaint. However, the class representatives standing alone appear to satisfy the requisite $50,000 in controversy because:

A. They allege an entitlement to compensatory damages as well as statutory damages. In the case of statutory damages, the class representatives claim an entitlement to treble damages under the New Mexico Unfair Practices Act, NMSA 1978 § 57-12-10. *See*, complaint, page 19. The named plaintiffs also claim a right to forfeiture of all finance charges, delinquency charges and collection and other charges by the holder of their retail installment contract, pursuant to the New Mexico Motor Vehicle Sales Finance Act. *See*, complaint, page 22. The named plaintiffs also seek to void their retail installment contract in its entirety. *See*, complaint, page 22.

B. They allege an entitlement to punitive damages under their common law claims. *See*, complaint, page 24, 25, 26. Claims for punitive damages must be included in the computation of the amount in controversy. *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 88 L.Ed. 15 (1993).

C. They allege an entitlement to attorney fees under all of their claims. *See*, complaint, ¶ 41. The attorney fees of the entire class are attributable to the named plaintiffs for purposes of satisfying the jurisdictional amount. In re Abbott, 51 F.3d 524 (5th Cir. 1995).

"In a class action, so long as the class representatives meet the amount-in-controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims." *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 523 (D.C. Tex. 1995).

Even if the claims of the class representatives standing alone do not satisfy the requisite amount in controversy, punitive damage claims in a class action suit may be considered in the aggregate when determining the amount in controversy. *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). Thus, removal is proper although individual transactions may not reach the jurisdictional amount, since punitive damages are a collective right in which putative class members have a common, undivided interest. *Tapscott*, 77 F.3d at 1358.

5. This court has original jurisdiction of this action under 28 U.S.C. § 1332. Pursuant to 28 U.S.C. §§ 1441 and 1446, this action may be removed to this court.

6. Copies of all process, pleadings, and orders served upon defendants are attached hereto as Exhibit "A" and made a part hereof.

7. This action was commenced September 13, 1996. Century-National Insurance Company first received a copy of the summons and complaint, through service or otherwise, on September 27, 1996. Upon information and belief, Franklin Capital Corporation first received a copy of the summons and complaint, through service or otherwise, on October 14, 1996. Accordingly, 30 days have not elapsed since the first receipt of the summons and complaint by the defendants in this action, and removal is therefore timely.

8. Defendants, immediately upon filing this notice, have given written notice thereof to plaintiffs as required by 28 U.S.C. § 1446(d) and have filed a copy of said petition with the clerk of the court from which this action was removed.

9. The consent and concurrence with this removal by Franklin Capital Corporation is reflected on the Consent to Removal, a copy of which is attached hereto as Exhibit B and made a part hereof.

WHEREFORE, Century-National Insurance Company, with the consent and concurrence of Franklin Capital Corporation, hereby requests this court to remove Cause No. CV 96-0008638 from the Second Judicial District Court, County of Bernalillo, State of New Mexico, into this court for trial and determination.

[signatures and exhibits omitted in this printing]

Excerpts of Transcript of Proceedings in
U.S. District Court

November 25, 1997 (pp. 29-36)

MR. MALAKOFF: . . . And, finally, I would—I would like to raise one issue with the Court that could be raised at a later time, and that's simply that based on the affidavits that Franklin filed which are not before the Court, that I don't believe there's jurisdiction with this Court, and we would request the Court to set up a briefing schedule requiring Century and Franklin to justify the removal from state to federal court because we don't believe there is jurisdiction. And they've taken inconsistent positions—

THE COURT: Well, I have considered that issue, and I was concerned about whether or not the petition for removal adequately alleged the appropriate amount of damages, but I have not made any analysis of that. I was wondering if that was adequate. If you want that brought to the Court's attention, it's your obligation to do so. And I'm not sure that at this point in time it's well taken. There is some kind of limitation on the time within which such motions may be filed under the diversity jurisdiction. So I'm not going to do anything about that right now. You can file a motion if you wish, and it will be addressed as every other motion, okay?

* * * *

MR. MALAKOFF: Thank you, Your Honor. Just at the time of removal, we interpreted the removal to be the plaintiffs' arguably had a claim over 50,000. Of course, there was no evidence that each class member had a claim of over 50,000. But as this Court knows, the Seven Circuit, in *Strongberg*, which is at 77 F.3d 721, and earlier the Fifth Circuit in *Abbott* at 51 F.3d 524, both found that the *Ezon* case, which said you could not aggravate, had been overruled by Congress. And so based on the removal at that time, we decided not to contest jurisdiction.

However, last month Franklin put in an affidavit which the Court does not have because it's not been filed yet, and in that affidavit Franklin stated that the Martins had made no payments for the PSI insurance. We disagree with that, but we now have a contention in the record between Century's removal papers which Franklin joined in and the—it's an October 10th dated affidavit which we received on October 21 which put us in a position where we became concerned about jurisdiction because while we have a strong preference to be in federal court normally, its—the fact of the matter is we don't want to litigate for a couple of years and then go to a circuit where there's no jurisdiction.

THE COURT: I don't either.

MR. MALAKOFF: With respect to the Court's timeliness concerns, there is a 30-day requirement, and I think it's 20 U.S.C. 1441, but that does not apply to subject matter jurisdiction. It would certainly apply to personal jurisdiction in other matters, but subject matter jurisdiction is always an issue in front of the federal court and, in fact, could either be raised at the Tenth Circuit or the Supreme Court for the first time and would have to be considered. It is not subject to any limitation. And, therefore, in light of the fact that the only basis we know to support jurisdiction which we were willing to accept indicated that there was jurisdiction until this affidavit was submitted to us on October 21, we were willing to accept that.

I don't believe it is our burden to show that this Court has jurisdiction since we didn't come here, but if the Court wants us to take that burden, we will do so.

THE COURT: You're today asserting that the Court does not have jurisdiction. Isn't that what you're doing?

MR. MALAKOFF: Yes, I am, Your Honor, based on Franklin's affidavit.

* * * *

THE COURT: . . . If you wish to file a motion attacking the Court's jurisdiction, please do so. I'd be delighted if I didn't have jurisdiction over this case.

MR. MALAKOFF: We will do so, and we'll do it in accordance with local Rule 7.

* * * *

THE COURT: Here's what I'm going to do: I'm going to grant your motion to amend contingent upon this Court finding that it has jurisdiction following your filing of a motion attacking this Court's jurisdiction. Do you understand?

MR. MALAKOFF: I do; Your Honor. I would hate to use the word "attack." It's—

THE COURT: That's what it is.

MR. MALAKOFF: The jurisdiction, as the Court knows, is dividing the federal courts of this country. And in terms of district courts, one could easily cite 25 or 30 cases that interpret 1367 rulings and the same number going the other way. It's—my only concern is that in light of that, of Franklin's affidavit, we not go too far down the path at this point until we learn the views of this Court.

THE COURT: Mr. Malakoff, I used the word "attack," you didn't use it. That's what it is. I don't mind my jurisdiction being attacked. I am not offended by that. As a matter of fact, I enjoy it, okay?

* * * *

THE COURT: Yes, I'll just take that under advisement, the motion to dismiss under advisement at this time. I will tell you that I'm inclined, if I should have to rule today on the motion to dismiss, to dismiss it based upon the allegations of the complaint with respect to Century.

MR. MALAKOFF: I think I can sense that, Your Honor. And I certainly apologize for the inadequate pleading we provided the Court. I believe now that we do have the Rule 26(a) discovery and we do have the answers to our interrogatories and requests, we can fill in the gaps that the Court correctly observed existed.

Excerpt of Transcript of Proceedings in U.S. District Court

April 14, 1998 (pp. 46-48)

THE COURT: . . . I must determine whether or not the Court has jurisdiction based upon the allegations of the complaint, whether the allegations of the complaint are valid under the law or not. The allegations of the complaint, as counsel for defendants said, request that the—all amounts paid be recovered or returned to the plaintiff by Franklin, and asks that the sales contracts be voided. Plaintiff asserts that that was inconsistent with 58-19-11(B), and it may be. But its' still a demand for recovery. What does that include? Those items are enumerated in the briefs of both the defendants, which include the down payment of $3,937, finance charge of $6,374, insurance premiums of $7,636, finance charge of $1,758, late fees of $81, administration fees of $35 on two different occasions out of complaint paragraphs 31 and 32, and a repossession service charge in paragraph 33, and a second repossession service charge.

Now, I can use those words and obtain in excess of $50,000 by trebling those items. Then I can add a reasonable attorneys' fee to that and also assume that if the plaintiff prevails that I would instruct a jury that punitive damages are awardable. If we're only talking about the plaintiff, the attorneys' fees and punitive damages are not going to be $50,000 for attorneys' fees and some other unknown number for punitive damages, but the elimination of the down payment number, if that is inappropriately included in the trebling, would amount to less than $12,000. Given the amount of work that has already been expended in this case, it would be incredible for me to conclude that there has not been substantially more than $12,000 in fees incurred by the plaintiffs' attorneys, even if this case is not certified as a class. The complaint itself, when reviewed, would compel that conclusion by this Court, without reference to the pleadings—

excuse me, the briefs that have been filed since the complaint was filed.

I do not decide because I believe it unnecessary whether punitive damages need to be or may be aggregated to satisfy a jurisdictional minimum. I will observe that the purpose of this case, as counsel for defendants have noted, is not to recover $3,000 for this plaintiff, if that's the only damages they have, but rather to utilize the class action vehicle provided in the federal rules to recover similar kinds of damages perhaps on behalf of a number of other plaintiffs, assuming that there is numerosity here and an aggregate of many times more what the plaintiffs' attorney might recover in attorneys' fees for just this plaintiff.

All those matters considered, I conclude that this Court has jurisdiction. And, as I mentioned in our last hearing, that's not a terribly happy thought for me because if this class eventually does get certified as a class, it's not the kind of case that I would look forward to coming to the office to deal with. So I also note for counsels' edification that I don't want to take jurisdiction over something that I don't have jurisdiction over, but I am required to exercise my jurisdiction when it appears on the face of the complaint. So I will deny the motion to remand.

And I thank you, Mr. Malakoff, for filing this motion and these briefs and doing an able job because after the issue was raised by you, it was my request of you to do that, and I appreciate that.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN, Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' motion to certify for immediate appeal this Court's May 21, 1998 order denying the Plaintiffs' motion to remand. (Docket No. 55).[1] The Court, having read the pleadings of both parties and being fully advised in the premises, finds that Plaintiffs' motion is not well taken and shall be denied.

Plaintiffs' motion is brought pursuant to 28 U.S.C. § 1292(b):

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground

[1] Plaintiffs seek amendment of this Court's May 21, 1988 order to include certification of interlocutory appeal language under 28 U.S.C. 1292(b). The actual title of this motion is "Motion to Amend the May 21, 1988 Order Denying Plaintiffs' Motion to Remand to Allow Interlocutory Review Under § 1292(b)".

> for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Federal courts universally recognize that § 1292(b) should be construed strictly and that appeals under this section are disfavored and should be allowed only sparingly. *See, In re Ingram Towing Co.*, 59 F.3d 513 (5th Cir. 1995). The party seeking certification for interlocutory appeal bears the heavy burden of showing that the order in question is exceptional. *See, In re Flor*, 79 F.3d 281 (2d Cir. 1996). An order is considered exceptional for example, where the appellate court's immediate review of the order may avoid extensive and costly litigation. *Terra Intern.* v. *Mississippi Chemical Corp.*, 922 F. Supp 1334 (N.D. Iowa 1996), *aff'd* 119 F.3d 688 (8th Cir. 1997). Generally, courts should decline to override the important historic policy against piecemeal litigation and appeals. *See PYCA Indus. Inc.* v. *Harrison County Waster Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996).

Before reviewing each of the three prerequisites of § 1292(b),[2] I note that the order in question involves this court's refusal to remand this case to state court—a highly discretionary decision. This discretionary nature of the decision generally operates against satisfaction of the first two requirements: that the order presents a "(1) controlling questions of law on which there is (2) substantial ground for difference of opinion". Given the discretionary nature of the decision, it is difficult for the Plaintiffs to successfully assert that the "difference of opinion" element is compelling.

The three questions posed by Plaintiffs for certification involve the methods used by this Court in determining whether

[2] The party seeking certification must satisfy all three criteria; satisfaction of a single criterion, standing alone, cannot be determinative. *See Katz v. Carte Blanche Corp.*, 496 E.2d 747, 754 (3rd Cir. 1974).

the Plaintiffs' claims meet the amount in controversy requirements of 28 U.S.C. § 1332. Specifically, Plaintiffs frame what they consider to be three "controlling legal" questions, as follows:

1. Whether a district court can disregard state law in determining whether a plaintiff's pled state statutory law claims exceed the amount in controversy requirements of 28 U.S.C. § 1332?

Plaintiffs argue that this Court disregarded state law and focused only on the allegations of the complaint to determine whether the alleged damages would meet the $50,000[3] jurisdictional limit contained in 28 U.S.C. § 1332. In other words, Plaintiffs argue that their damages should be determined based on state statutory law, which they argue demonstrates that the complaint does not state a viable claim to "void" the Martin contract as pled. Plaintiffs assert that their complaint does not meet the $50,000 jurisdictional limit required by § 1332. It is their position that this Court should have, but did not, carefully analyze whether any state statutory claims for damages are colorable under state law before it can conclude that it has subject matter jurisdiction.

I have read the cases cited by Plaintiffs. I read these cases as stating that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co.* v. *Red Cab. Co.*, 303 U.S. 283, 289 (1938); and that legally impossible damages flunk the "legal certainty" test. *Pratt Central Park Limited Partnership* v. *Dames & Moore, Inc.*, 60 F3d. 350 (7th Cir. 1995). At the April 14, 1998 hearing, I stated on the record my reasons for concluding that the Martins' claims meet the requisite jurisdictional amount. It does not appear to

[3] This cause of action arose before the new amount in controversy requirement of $75,000 went into effect. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996).

a legal certainty that their claims are for less than $50,000 and I conclude that they are colorable for the purposes of conferring jurisdiction. In making this determination, I have not disregarded state law, but in fact have considered it. I conclude that there is no substantial ground for a difference of opinion on this matter.

2. Whether a district court in a removal proceeding under 28 U.S.C. § 1447 can disregard the class allegations pled in the complaint at the time of a defendant's removal when it determines whether or not it has subject jurisdiction?

Plaintiffs argue that this Court should have, but did not, consider whether remand would be proper at the time of removal, considering the class allegations in the removed complaint. They argue that the plain language of 28 U.S.C. § 1447(c) and Supreme Court case law demonstrate that this Court is required to make this jurisdictional determination with respect to putative class members in ruling on a motion to remand, before it can properly assert subject matter jurisdiction in this case, *citing Zahn* v. *International Paper Co.*, 414 US 291 (1973). They argue that the fact that this action was not certified as a class action does not alter this responsibility. For there to be diversity jurisdiction, they contend that there must be complete diversity between the named representatives of the putative class and the defendants, and that each member of the putative class must meet the statutorily required minimum amount in controversy.

My examination of the Notice of Removal and of the "Class Action Complaint" leads me to conclude that complete diversity of citizenship exists between the two named Plaintiffs, the putative class members and the defendants. *See Notice of Removal*, ¶ 3. Furthermore, in the section above, I have addressed my conclusion that Plaintiff Martins' asserted claims are colorably worth the jurisdictional amount of $50,000. As I read the "Class Action Complaint", each of the

putative class members are, as noted in the caption, "similarly situated" to the Martin Plaintiffs. In fact, the relief sought for each and every count of the complaint is the same for the Martins, as class representatives, and for the putative class plaintiffs. This fact leads me to conclude that, based upon the allegations of the complaint at the time of removal, the claims of the putative class members were sufficient to invoke the diversity jurisdiction of this Court.[4] The complaint, at the time it was filed, satisfied the jurisdictional amount required by 28 U.S.C. § 1332.[5]

My exercise of subject matter jurisdiction over the remand issue was properly based upon these considerations of the class allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue.

3. Whether a district court may retain jurisdiction under its 28 U.S.C. § 1367 supplemental jurisdiction after the Plaintiffs and Defendants agree that Martins' individual plead claims do not (and therefore, did not) establish an amount in controversy sufficient to satisfy § 1332?

Plaintiffs correctly argue that if it is discovered, anytime during the course of litigation, that at the time the action was

[4] Although it is not necessary to this Opinion, I note that the Fifth Circuit has held that *Zahn*'s holding that each plaintiff must independently satisfy the jurisdictional amount has been overruled due to congressional amendment of 28 U.S.C. § 1367. *See In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). *See also Ard et al. v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 600 n.2 (5th Cir. 1998), *reh. denied.*

[5] The Court notes that, based upon facts presented to it relating to the class certification issue, that it became apparent that the putative class members did not have sufficient commonality of claims to justify such a certification. The Court accordingly declined to certify a class. Nonetheless, the claims as contained in the complaint at the time of removal were colorable and sufficient for purposes of this jurisdictional determination.

commenced, the claims did not exceed the jurisdictional amount, then the complaint must be dismissed. *Watson* v. *Blankinship*, 20 F.3d 383, 385 (10th Cir. 1994). They argue that the Court erred in not considering the Affidavit of Harold Miller that showed that at the time of removal, the Martins' insurance claim was $1,854.08, not $7,636, because of a 1996 refund. Plaintiffs ask that because now that it is known that at the time of removal the claims did not meet the jurisdictional amount, the case should be dismissed. They argue that because there is no basis for this Court to continue to assert jurisdiction, the case should be remanded to state court.

The amount in controversy requirement is determined at the time the complaint was filed. *See Emland Builders, Inc.* v. *Shea*, 359 F.2d 927, 929 (10th Cir. 1996). I have reviewed Mr. Moore's Affidavit. Even if I use the figure of $1854 instead of $7636 for the insurance premium element of damages, as set out in Moore's affidavit, Plaintiffs' claims meet the jurisdictional limit, when reasonable attorney fees are added into the equation. *See Smith* v. *Hawkeye-Security Ins. Co.*, 842 F. Supp. 1373 (1994). I elaborated upon this at my oral ruling at the April 14, 1998 hearing in this matter. I find no substantial ground for a difference of opinion on this issue.

Furthermore, to the extent that it has been revealed during discovery that any putative class members were not actually "similarly situated" to the Martins with regard to their respective insurance situations, I have rejected them as potential parties in this lawsuit, and due to a lack of commonality of claims, refused to certify a class. It would now appear, post-removal, that the putative class members do not satisfy the jurisdictional amount. I realize that *Zahn* requires that district courts may entertain the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional-amount requirement. *Id* at. 297-98. I have already declined to exercise subject matter jurisdiction over these putative plaintiffs, which renders an analysis under *Zahn* unnecessary.

Conclusion

For the reasons set forth above, I conclude that Plaintiffs have not satisfied all three requirements under 28 U.S.C. § 1292(b) and that Plaintiff's motion to certify for immediate appeal shall be denied.

As discussed at the April hearing in this matter, Plaintiffs are now granted leave to file a motion to amend their complaint with the Court. If they desire to file such a motion, they are instructed to attach a copy of their proposed amended complaint to the motion. Such a motion must be filed within thirty (30) days of the date of entry of this Memorandum Opinion and Order. Discovery shall be stayed, pending the Court's decision on the Plaintiffs' motion to amend.

IT IS SO ORDERED.

/s/ LeRoy Hansen
LEROY HANSEN
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 29, 2001]

No. 99-2131

GERALD T. MARTIN and JUANA M. MARTIN, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1480-LH)

Before SEYMOUR and MURPHY, *Circuit Judges*, and KANE, *Senior District Judge*.*

SEYMOUR, *Chief Judge*.

Gerald and Juana Martin appeal the district court's order dismissing their complaint with prejudice. We conclude that we have jurisdiction over this appeal, and that the district court lacked subject matter jurisdiction. Accordingly, we reverse and remand with directions to remand this action to state court.

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* Honorable John L. Kane, Jr., Senior District Court Judge, District of Colorado, sitting by designation.

I

The Martins originally brought this proceeding in New Mexico state court, individually and on behalf of all persons similarly situated, seeking damages under state statutory and common law for alleged illegalities with respect to automotive financing and insurance contracts. The plaintiff class alleged defendant Franklin Capital Corporation, which purchased their installment sales contracts from car dealers, deliberately over-charged them for required insurance coverage purchased through defendant Century National Insurance. Invoking diversity of citizenship, Century removed the case to federal court with the consent of Franklin. The Martins then filed a motion to remand to state court for lack of subject matter jurisdiction, arguing their claims did not meet the $50,000 amount-in-controversy requirement for diversity jurisdiction.[1]

In orders entered the same day, the district court denied the Martins' motion to remand, denied the Martins' motion for class certification, and granted Century's motion to dismiss for failure to state a claim. This left the Martins with an individual case against Franklin in the federal district court. The Martins subsequently requested that the court certify the order denying remand for immediate appeal under 28 U.S.C. § 1292(b), which the court denied. The district court order denying the Martins' motion to remand contains virtually no comment or analysis supporting its decision. However, in its memorandum opinion and order denying the Martins' section 1292(b) motion, the court addressed the amount-in-controversy requirement by stating "[i]t does not appear to a legal

[1] This action was filed in state court on September 13, 1996. At that time, 28 U.S.C. § 1332 required the amount in controversy to exceed $50,000. Although Congress subsequently amended the statute to increase the jurisdictional amount to $75,000, the amendment applies only to cases filed on or after January 17, 1997. *See* Federal Courts Improvement Act of 1996, § 205, Pub. L. No. 104-317, 110 Stat. 3847, 3850 (Oct. 19, 1996).

certainty that [the Martins'] claims are for less than $50,000 and I conclude that they are colorable for the purposes of conferring jurisdiction." Aplt. App., doc. 13 at 3.

It thus appears that, in assessing the evidence, the court required the Martins to prove to a legal certainty that their claims were below the jurisdictional amount rather than placing the burden on defendants to show by a preponderance of the evidence that the amount was met. The court also appears to have attributed to the Martins all of the attorneys fees requested on behalf of the class. *See id.* at 6. The court held that any putative class members whose claims did not satisfy the jurisdictional amount were irrelevant because they had already been removed from the case by the court's order refusing to certify the class. *Id.*

The Martins reasserted their belief that the court lacked jurisdiction, and they requested an order dismissing their complaint with prejudice so they could immediately appeal the jurisdictional issue without expending further time and money in federal court. Noting that the Martins' dismissal request was motivated by their desire to take an immediate appeal and that defendants had failed to file a response, the district court granted a voluntary dismissal with prejudice.

On appeal, the Martins reassert their contention that the district court lacked subject matter jurisdiction over this action and therefore should have granted their motion to remand the case to state court. They contend that neither the complaint nor the notice of removal establishes by a preponderance of the evidence that the amount in controversy exceeds $50,000, and that the damages found by the district court reflect more than the amount claimed in their complaint. They also contend the court erred as a matter of law by failing to require each putative class member to independently meet the jurisdictional amount.

Defendants counter that the Martins waived their right to object to removal by failing to seek a remand within thirty

days, citing 28 U.S.C. § 1447(c). They also maintain the Martins' individual claims satisfied the jurisdictional amount. Finally, they contend the class' punitive damages could be aggregated and attributed to each class member to meet the jurisdictional amount and, in any event, any failure by putative class members to satisfy individually the jurisdictional amount was cured by the court's denial of class certification. We address each argument in turn.

II

Appellate Jurisdiction

We first address whether we have appellate jurisdiction. We raised the issue sua sponte, requesting the parties to address whether a voluntary dismissal with prejudice under these circumstances constitutes a final, appealable order for purposes of 28 U.S.C. § 1291. In assessing whether appellate jurisdiction exists in these circumstances, our inquiry is twofold: is the order granting the voluntary dismissal final; and is there a case or controversy in light of the fact that plaintiff sought the dismissal. After considering authority from other circuits and the purposes of the final order rule, we conclude that we have jurisdiction over this appeal.

First, we are convinced the dismissal with prejudice here is a final order for purposes of appeal. Nothing is left pending in the district court and, because the dismissal is with prejudice, the Martins are precluded from filing another lawsuit. The dismissal did not reserve the Martins' right to return to district court to litigate any remaining issues. If they lose on their appeal of the order denying remand, the litigation is terminated entirely. We agree with those authorities holding that a dismissal order is final under these circumstances. *See, e.g., Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999) (voluntary dismissal with prejudice final); *John's Insulation, Inc. v. L. Addison & Assoc.*, 156 F.3d 101, 107 (1st Cir. 1998) ("most circuits hold that voluntary dismissals, and

especially those with prejudice, are appealable final orders"); *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995) (judgment final when it bars claims forever); *see also* 15A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.8 (2d ed. 1992), at 623 (approving rule that holds judgment final when plaintiff who voluntarily dismisses abandons all remaining issues).

Viewing such a judgment as final does not undermine the final judgment rule by encouraging quasi-interlocutory appeals. "[I]f the plaintiff is unsuccessful in challenging the district court's action, then the dismissal operates as an adjudication on the merits and the litigation is terminated." *Concha*, 62 F.3d at 1507. Judicial economy is furthered because when "the appellant voluntarily dismisses his action with prejudice and loses on appeal, the district court is saved the time and effort of conducting extended trial proceedings and there is in addition no possibility of piecemeal appeals." *Id.* at 1508 n.8.

We also conclude that, even though the Martins requested dismissal, the appeal presents a case or controversy sufficient to support jurisdiction. Because the Martins were convinced the district court lacked diversity jurisdiction, they did not want to expend the resources necessary to proceed in federal court to a judgment on the merits, only to have the case remanded to state court on appeal for lack of jurisdiction. While such a dismissal may be technically voluntary, as a practical matter the Martins did not acquiesce in the judgment but rather were using dismissal to challenge the underlying ruling. When, as here, a plaintiff believes a ruling is so prejudicial to his case he is willing to risk losing the right to litigate completely in order to challenge it, a case or controversy exists and he should be allowed to appeal. *See John's Insulation*, 156 F.3d at 107 (voluntary dismissal with prejudice proper course of action when interlocutory ruling so

prejudicial that proceeding in district court would waste resources).

Because the Martins appealed a final order in a case or controversy, we have jurisdiction to address the appeal.

III

Diversity Jurisdiction

In their motion to remand, the Martins asserted a lack of federal diversity jurisdiction on the ground their action does not meet the $50,000 amount-incontroversy requirement imposed by 28 U.S.C. § 1332(a). We review de novo a district court's determination of the propriety of removal. *See Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1076 (10th Cir. 1999). In assessing the district court's ruling, we bear in mind that "[t]he courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states," *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1339 (10th Cir. 1998), and that the presumption is therefore "against removal jurisdiction," *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995).

A. The Burden of Establishing the Amount in Controversy.

When a case is originally brought in federal court, the plaintiff's claimed amount is presumed to support diversity jurisdiction. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). The same is not true, however, when the case has been removed from state court.

> In a removed case, unlike a case instituted in federal court, the plaintiff chose a state rather than federal forum. Because the plaintiff instituted the case in state court, "[t]here is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end."

Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997) (quoting *St. Paul Mercury*, 303 U.S. at 290);

see also Miera, 143 F.3d at 1340. Thus in a removed case, "[t]he defendant's claim that the amount in controversy exceeds $50,000 does not enjoy the *St. Paul Mercury* presumption of accuracy that the plaintiff's does." *Singer*, 116 F.3d at 376.

> Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when a plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

As the parties invoking the federal court's jurisdiction in this case, defendants bear the burden of establishing that the requirements for the exercise of diversity jurisdiction are present. *See Huffman*, 194 F.3d at 1079. We have held that "[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal." *Laughlin*, 50 F.3d at 873. In this case, the complaint itself does not specify the amount of damages requested. Indeed, defendants in their notice of removal observe that "[t]he amount in controversy, exclusive of interest and costs, cannot be determined from the face of the complaint." Aplt. App., doc. 4 at 2. When, as here, the plaintiff's damages are unspecified, courts generally require that a defendant establish the jurisdictional amount by a preponderance of the evidence. *See, e.g., St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Singer*, 116 F.3d at 376; *United Food & Commercial Workers Union, Local 919 v. CenterMark Prop. Meridan Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994); *Gafford v. General Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); *Varella v. Wal-Mart Stores, East, Inc.*, 86 F. Supp.2d 1109, 1111 (D. N.M. 2000);

see also McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (party asserting jurisdiction must prove jurisdictional prerequisites by a preponderance of evidence).[2]

Although this court has not expressly adopted the preponderance standard in these circumstances, we have stated that the requisite amount in controversy "must be *affirmatively established* on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873 (emphasis added). The italicized language requires at a minimum that the jurisdictional amount be shown by a preponderance of the evidence. Because, as we discuss below, we conclude that defendants have failed to meet this burden, we need not decide whether a more stringent one should be applied.

B. Determination of Amount in Controversy

We turn to a de novo review of the district court's conclusion that diversity jurisdiction is present here.[3] The complaint

[2] A few courts have placed greater or lesser burdens on defendants asserting removal jurisdiction based on diversity. *See generally* 14C CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3275 (3d ed. 1998), at 89-95 (discussing standards).

[3] We give short shrift to defendants' argument that the Martins waived federal diversity jurisdiction by failing to challenge the amount in controversy within thirty days. The governing statute expressly provides to the contrary: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). As the Supreme Court has noted:

> section [1447(c)] differentiates between removals that are defective because of lack of subject-matter jurisdiction and removals that are defective for some other reason . . . . For the latter kind of case, there must be a motion to remand filed no later than 30 days after the filing of the removal notice. For the former kind of case, remand may take place without such a motion and at any time.

Wisconsin Dep't of Corr. v. Schacht, 524 U.S. 381, 392 (1998) (citations omitted). In *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), for example, we raised the issue of diversity jurisdiction on appeal and concluded it was lacking, even though the plaintiff "neither objected to removal nor questioned the amount in controversy." *Id.*

does not in any of its counts request a specific dollar amount. Nonetheless, the district court adopted defendants' construction of the Martins' pleading and concluded that the complaint itself established the requisite amount in controversy.[4] We have carefully reviewed the complaint and we agree with the Martins that it does not demonstrate by a preponderance of the evidence claims in excess of $50,000. For example, it appears defendants simply viewed every dollar amount mentioned in the complaint as an item of damages claimed by the Martins without regard to allegations making clear the Martins were not in fact seeking all those amounts.[5] In

[4] We have held that a defendant's economic analysis of the plaintiff's claims for damages, "prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. . . . [T]he requisite amount in controversy . . . must be affirmatively established on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873. At the hearing below, the district court recited and adopted the amounts set out by defendants' briefs in support of jurisdiction. *See* Aplt. App., doc. 20 at 46. The record on appeal does not include these briefs and it is arguable, given our holding in *Laughlin*, that they should not have been considered by the district court. We need not decide whether the court erred in this regard, however, in view of our conclusion that the Martins' complaint does not support the construction defendants placed upon it in those briefs.

[5] Defendants apparently included in their calculation finance charges of over $8000 and insurance premiums of over $7000 despite allegations in the complaint that because the Martins defaulted on their installment contract, they made only a few payments on the finance charges and no payments on the insurance premiums, and sought to recover only the charges they actually paid. Defendants included two repossession charges as items of damages although the Martins did not allege that the first of these, in the amount of $420, was illegal. Defendants likewise included a down payment of almost $4000 which the Martins were not attempting to recover. On appeal, defendants also argue that the entire amount of the sales contract is to be included, notwithstanding that the Martins, while

addition, while the Martins did seek treble damages under one state statute, defendants have failed to establish what specific damages were recoverable under that statute and instead merely assumed that all amounts mentioned in the complaint were subject to trebling.

Because we conclude that the amount-in-controversy requirement is not satisfied on the face of the complaint, we turn to the notice of removal. As mentioned above, defendants conceded in their removal notice that the amount in controversy could not be determined from the face of the complaint. Aplt. App., doc. 4 at 2. In contending that the requisite amount was nonetheless satisfied, defendants began by summarizing the allegations and the requested relief asserted by the Martins. This mere summary, of course, does not provide the requisite facts lacking in the complaint. Defendants also asserted that jurisdiction was satisfied because the attorneys fees and the punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy, and that so long as the Martins as class representatives met the jurisdictional amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims. As we discuss below, none of these assertions supports the existence of diversity jurisdiction.

1. Aggregation of Punitive Damages

We turn first to defendants' contention, both in their removal notice and on appeal, that the punitive damage claims of the putative class members may be aggregated and attributed to the Martins and to each class member, and that these aggregated damages satisfy the jurisdictional amount with respect to each member of the putative class. In support of this argument, defendants rely on the cases of *Tapscott v. MS*

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seeking rescission of the contract, sought as damages only the amounts they had actually paid under it.

Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996), and *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), both of which have been disapproved by the circuits that decided them. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (explaining *Tapscott* not valid precedent because it conflicts with earlier ruling on same issue); *Ard v. Transcont'l Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998) (*Allen* decision due to peculiarity of Mississippi law and does not represent precedent for any other state). Indeed, all of the circuits considering the issue now hold that punitive damages cannot be aggregated and attributed in total to each member of a putative class for purposes of satisfying the amount-in-controversy requirement of diversity jurisdiction. *See, e.g., Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264-65 (11th Cir. 2000); *Ard*, 138 F.3d at 600-02; *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997); *see also Anthony v. Security Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996) (implicitly rejecting aggregation of punitive damages by concluding that "[t]he plaintiffs in this case would have to recover on average at least $47,118.36 in punitive damages to satisfy 28 U.S.C. § 1332").

Although this court has not ruled directly on the matter, we have pointed out that the Supreme Court has historically interpreted section 1332 "to require plaintiffs who have separate and distinct claims, but unite together in a single suit, to each meet the jurisdictional amount in controversy." *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998). We observed that the Court has therefore only permitted aggregation when "a single plaintiff seeks to aggregate . . . his own claims," or when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* As we discuss below, we now hold, in light of the language in *Leonhardt* and the analysis of our sister circuits, that punitive damages may not ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction.

The court in *Gilman* explained the reasoning supporting this conclusion.

> As one court expressed the principle, the "paradigm cases" allowing aggregation of claims "are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res."

Gilman, 104 F.3d at 1423 (quoting *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D. N.J. 1996)). The court pointed out that even though a class claim for punitive damages may create a single pool of recovery, "a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the `common fund' doctrine." *Id.* at 1430. Each class member could sue separately for punitive damages and have his right to recovery determined without implicating the rights of every other person claiming such damages. *Id.* Because a class member's right to punitive damages is separate, distinct, and independent from those of other class members, the class claim for such damages does not seek to enforce a single right in which the class has a common and undivided interest. Punitive damages therefore may not be aggregated in a class action and attributed in total to each member of the class. We agree with *Gilman* and the other courts, and we reject defendants' argument that the jurisdictional amount with respect to the Martins is satisfied on the basis of the aggregated claims of the class members to punitive damages.

2. Aggregation of Attorney Fees

In their removal notice, defendants also assert that "[t]he attorney fees of the entire class are attributable to the named plaintiffs for purposes of satisfying the jurisdictional amount." Aplt. App., doc 4 at 3. Although defendants do not present

this argument directly on appeal, they contend that all of the fees requested by the Martins should be considered in determining whether their claims satisfy the amount in controversy, in effect attributing all the fees that will potentially be recovered in this putative class action to the class representatives.

Courts have generally held, under the same rationale applied to preclude the aggregation of punitive damages, that attorneys fees cannot be aggregated for purposes of diversity jurisdiction. *See, e.g., Morrison*, 228 F.3d at 1266-68 (when each class member could recover attorneys fees if he sued separately, right to recover fees was separate and distinct and could not be aggregated); *see also Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (aggregation of attorneys fees would conflict with Supreme Court authority requiring plaintiffs with separate and distinct claims to each meet jurisdictional amount).[6] We agree and conclude that potential attorneys fees requested on behalf of the class may not be aggregated and attributed entirely to the Martins in assessing whether they meet the amount in controversy.[7]

In view of our conclusions that neither the face of the complaint nor the removal notice demonstrate that the Martins'

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[6] In their removal notice, defendants cited *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), as support for their contention that attorneys fees can be aggregated. As the Fifth Circuit has observed, however, the holding in *Abbott Laboratories* is peculiar to a Louisiana statute and "[t]he standard approach to awards of attorney fees in a class action context is to distribute them pro rata to all class members, both named and unnamed." *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.5 (5th Cir. 2001).

[7] The result might be different if the state statute under which fees are sought expressly awards those fees solely to the class representatives. *See, e.g., H & D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330-31 (5th Cir. 2000). Defendants have made no showing that the statutes at issue in this case do so.

claims will exceed $50,000, and that neither the punitive damages nor the attorneys fees sought by the class can be attributed entirely to the Martins as class representatives, we hold defendants have failed to show by a preponderance of the evidence that the Martins' claims meet the amount in controversy necessary to the exercise of diversity jurisdiction.[8]

Because the Martins' claims do not meet the jurisdictional amount, the disposition of the class claims by the district court is irrelevant. Although we therefore need not address the remaining arguments with respect to the class, we make the following observations. This court has specifically rejected defendants' contention that so long as the class representatives meet the jurisdictional amount, all class members fall within the court's supplemental jurisdiction. *See Leonhardt*, 160 F.3d at 638-41 (rejecting argument that "the enactment of 28 U.S.C. § 1367, concerning supplemental jurisdiction, altered the historical aggregation rules under § 1332 for class actions," and concluding enactment of § 1367 did not overrule preexisting authority holding "each plaintiff in a diversity-based class action must meet the jurisdictional

[8] We reject the argument based on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), that diversity jurisdiction exists nonetheless because the district court refused to certify the class and the resulting deletion of the putative class members cured any jurisdictional defect their presence might earlier have created. Although the Supreme Court held in *Caterpillar* that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered," *id.* at 64, the Court also observed that "if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated," *id.* at 76-77 (italics deleted). Because defendants failed to establish that diversity jurisdiction is present with respect to the Martins, the jurisdictional defect remained at the time of judgment. *See Gilman*, 104 F.3d at 1421 (when removing defendant fails to establish subject matter jurisdiction by the time judgment is entered, judgment must be vacated and remanded with instructions to remand to state court).

amount in controversy under § 1332").[9] In any event, because the class representatives here do not meet the jurisdictional amount, supplemental jurisdiction over class members would not be available.[10]

In sum, we hold that we have appellate jurisdiction over this final, appealable order. Defendants have failed to establish the requisite amount in controversy, and the district court therefore lacked subject matter jurisdiction.

Accordingly, we REVERSE the judgment of the district court and REMAND with directions to remand this action to state court.

[9] In *Abbott Laboratories*, 51 F.3d 524, the Fifth Circuit reached a result directly contrary to our holding in *Leonhardt*. The Supreme Court granted certiorari in *Abbott Laboratories* to address whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled the authority upon which this court relied in *Leonhardt*, *see Free v. Abbott Labs., Inc.*, 528 U.S. 1018 (2000), and affirmed the Fifth Circuit's decision by an equally divided Court, *see Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (per curiam). An unexplained affirmance by an equally divided court is not entitled to any precedential weight. *See Rutledge v. United States*, 517 U.S. 292, 304 (1996). *Leonhardt* accordingly remains controlling law in this circuit.

[10] The only allegations in the complaint relevant to the putative class members are assertions that their individual damages "are too small in number to justify the expense and effort required to bring suit separately," Aplt. App., doc. 2 at 14, and that the "Martins claims are not only typical but identical to the claims of the members of the Class," *id.* at 16. These allegations do not establish individual claims in excess of $50,000, particularly given our holding that neither attorneys fees nor punitive damages may be aggregated and attributed in total to each class member. Accordingly, we conclude that defendants have failed to establish the amount in controversy with respect to any of the putative class members.